IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 01-455-A**
	)	
ZACARIAS MOUSAOUI,	)	
	)	
Defendant	)	

STANDBY COUNSEL'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NOTICE OF INTENT TO SEEK PENALTY OF DEATH[1]

The Government has recently submitted two new court decisions to the Court in reference to the Federal Death Penalty Act ("FDPA"), *United States v. Johnson*, ___ F. Supp. 2d ___, 2003 WL 43363 (N.D. Iowa, Jan. 7, 2003) and *Sattahzan v. Pennsyhlvania*, ___ S.Ct. ___, 2003 WL 10481 (Jan. 14, 2003). Because of the significance of the latter case in understanding the Court's seminal decisions in *Ring v. Arizona,* 122 S.Ct. 2428 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and because it is inconceivable that the pro se defendant would be able to parse the multiple opinions in *Sattahzan* and assess its implications for an understanding of the Supreme Court's decisions previosly discussed by standby counsel and counsel for the government, standby counsel believe that it is incumbent upon them to submit this supplemental memorandum.

I. The Supreme Court's Decision in *Sattahzan*

In *Sattahzan*, 2003 WL 10481, a plurality of the Supreme Court consisting of Justices Scalia and Thomas, and Chief Justice Rehnquist, made it clear that there was no

[1] Pursuant to the Court's August 22, 2002 order, a copy of this motion was provided to Mr. Moussaoui for his review before the motion was filed.

practical significance to its use of the phrase "functional equivalent of an element" in *Ring* rather than simply "element." The plurality stated directly that:

> [o]ur decision in *Apprendi* [] clarified that what constitutes an 'element' of an offense for purposes of the sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact . . . increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the state labels it – *constitutes an element* . . . .

Id., 2003 WL 10481 at *7 (emphasis added). The plurality then referenced the "functional equivalent" language of *Ring*, and stated immediately thereafter, that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances . . . .'" *Id.* Moreover, the plurality stated later in the opinion that "'murder plus one of more aggravating circumstances' is a separate offense from 'murder' *simpliciter*."[2] *Id.* Applying these principles to the case before it, it stated that the death eligible offense for which Sattahzan was sentenced "is properly understood to be a *lesser included offense* of 'first degree murder plus aggravating circumstances.'"[3] *Id.* at * 8 (emphasis added).

While this portion of the *Sattahzan* opinion was specifically adopted by only three of the Justices, one of whom, the Chief Justice, had dissented in *Ring*, none of the others

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[2] The rationale for the "functional equivalent" language in *Ring* is clarified by this discussion. Rather than distinguishing the *constitutional significance* of the aggravating factors from other elements, it refers to their actual treatment by the legislature. Although the constitution demands that they be "elements" and that they be treated as such, they are not in fact elements because they were not treated as elements in Arizona's statutory scheme.

[3] The plurality also stated that the treatment of aggravating circumstances as elements of a greater offense is no different under the Fifth Amendment than under the Sixth Amendment. *Id.*, 2003 WL 10481 at *7.

who had been in the *Ring* majority took issue with it. Justice Kennedy, who joined the remainder of Justice Scalia's opinion in *Sattahzan*, did not discuss the *Ring/Apprendi* issue at all. One would think that, had he taken issue with this interpretation of a decision which he had signed onto, he would at least have noted his disagreement with it. Moreover, there clearly is no reason for Justice Kennedy to have noted his agreement with the plurality opinion on this point, since he previously had written that "read together, *McMillan [v. Pennsylvania*, 477 U.S. 79 (1986)] and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, *are the elements of the crime* for the purposes of the constitutional analysis." *Harris v. United States*, 122 S.Ct. 2406, 2419 (2002) (plurality opinion).[4] *See Johnson*, 2003 WL 43363 at *14 (noting that *Harris* plurality consisting of Justices Kennedy, O'Connor and Scalia, and Chief Justice Rehnquist agreed with this proposition).

As for the *Sattahzan* dissenters, it would be unreasonable to believe that they would not have protested an erroneous interpretation of such a key phrase from *Ring* by a plurality of the Court in *Sattahzan*, given the recency and significance of the *Ring* opinion. *See*, *e.g.*, *Ring*, 122 S.Ct. at 2449-50 (O'Connor, J., dissenting) (discussing the disruptive impact on death penalty schemes around the country that *Ring* would likely have). That is particularly true of Justice Ginsburg, who authored both the Court's opinion in *Ring* and the dissent in *Sattahzan*. However, not only did they not protest that interpretation, joined

[4] In addition to joining Justice Kennedy's concurrence in *Harris*, Justice O'Connor, while dissenting in *Apprendi* and *Ring*, agrees that those cases stand for the proposition that "any fact that increases the maximum penalty must be treated as an element of the crime . . . ." *Sattahzan,* 2003 WL 10481 at *10 (O'Connor, J., concurring in part and concurring in the judgement).

by Justice Breyer they stated that "for purposes of the Double Jeopardy Clause, capital sentencing proceedings involving proof of one or more aggravating factors *are to be treated as trials of offenses*, not mere sentencing proceedings." 2003 WL 10481 at *15 n. 6 (emphasis added) (citing *Sattahzan*, 2003 WL 10481 at **4-7, 9-10) (plurality opinion); *Ring*, 122 S.Ct. at 2428; *Bullington v. Missouri*, 451 U.S. 430 (1981)). The portion of the plurality opinion which the dissenters referenced for this proposition includes all the language cited by standby counsel above. Thus, the clear statement of the *Sattahzan* plurality that aggravating factors are actual elements of greater offenses has the support of *at least* six members of the Court.[5]

With that premise in mind, it becomes clear that the FDPA is unconstitutional for the reasons set forth previously by standby counsel. Most fundamentally, *Sattahzan* demonstrates that, as previously argued, the *Apprendi* line of cases does not merely establish rules of criminal procedure, but provide a fundamental rule of substantive criminal law. As to the FDPA in particular, beyond the basic fact that Congress plainly intended the aggravating factors to be sentencing factors and, therefore, they can not now be treated as something different, *i.e.*, elements of a greater offense, the FDPA states that the Rules of Evidence do not apply in the sentencing phase of a capital case. If the aggravating circumstances are offense elements, it would be fundamentally inconsistent with the Rules themselves to not apply the Rules, which state that they apply to criminal cases, *but not*

[5] It also commands the support of Justice Kennedy as demonstrated by his opinion in *Harris*. Only Justice Breyer's position remains ambiguous, since, while he dissented in *Apprendi* and *Ring*, he also joined the dissent of Justice Ginsburg in *Sattahzan*, which, of course, includes the language in footnote 6 cited above.

to sentencing proceedings. See, Fed. R. Evid. 101 and 1101(d)(3)[6] Thus, to reconcile the FDPA with the Rules of Evidence in light of *Ring* and *Sattahzan*, the Court would have to either limit the evidentiary exemption in the FDPA to issues other than the statutory aggravating factors, thereby violating the integrity of the FDPA, or maintain the integrity of the FDPA but exclude from the scope of the Rules of Evidence the elements which distinguish the offense of death-eligible murder from murder "*simpliciter*." While neither resolution would appear to be within the authority of the Court, the latter approach would also violate both due process and the Eighth Amendment,[7] by exempting from the Rules of Evidence the very elements which make the offense a capital charge.

II. Pre-*Sattahzan* District Court Cases

In the only decisions in this Court addressing the constitutionality of the Federal Death Penalty Act, Judge Lee, in two parallel decisions upheld its constitutionality. *See United States v. Regan*, 221 F. Supp. 2d 672 (E.D. Va. 2002) and *United States v. Lentz*, 225 F. Supp. 2d 666 (E.D. Va. 2002). The linchpin of those decisions was the Court's conclusion that *Ring* did not hold that a fact which increases the maximum punishment for an offense creates a new, greater offense. The Court emphasized the language in *Ring* that the aggravating factors in the Arizona death penalty scheme which establish death

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[6] Of course, along with the fact that the FDPA was placed in the section of Title 18 dealing with sentencing, the fact that the FDPA exempts its proceedings from the Rules of Evidence, consistent with Rule 1101(d)(3), is one of the primary indications that Congress intended the aggravating factors set forth in the FDPA to be treated as sentencing factors, not elements.

[7] The Eighth Amendment would be violated, of course, because capital trials require "heightened reliability" and the Rules of Evidence are intended to foster the reliability of trials.

eligibility are "'the functional equivalent of an element of a greater offense' but did not require that such factors become *actual elements of a new substantive offense*." *See Regan*, 221 F. Supp. 2d at 678 (emphasis added) (quoting and citing *Ring*, 122 S.Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494 n. 19). "All *Ring* stands for," the Court stated, "is that any factual determination necessary to impose the death penalty must be found by a jury beyond a reasonable doubt." *Id*. The Court further noted that the Supreme Court in *Apprendi* had stated that "'the substantive basis for . . . [the] enhancement is not at issue; [the] *adequacy of the procedure is."* 221 F. Supp. 2d at 678 (emphasis in original) *(*quoting *Apprendi*, 530 U.S. at 475). Judge Lee's decisions in these cases was fairly typical of the approaches taken by most district courts which have addressed the issue. *Cf*. *United States v. Fell*, 217 F. Supp. 2d 469 (D.Vt. 2002) (holding FDPA unconstitutional). While the Court's conclusions in *Regan* and *Lentz* about the significance of *Apprendi* and *Ring* for the FDPA are understandable, it is now apparent that they, like all the decisions upholding the FDPA, are erroneous.

The same is true of *Johnson*, the other decision recently submitted to the Court by the government, although it addresses the sentencing scheme under 21 U.S.C. § 848, rather than under the FDPA. The Johnson court also relied heavily on the "functional equivalent" language in *Ring*. *See* 2003 WL 43363 at *10-11, 13, 15. The court concluded that "[u]nder *Ring* and *Apprendi*, 'aggravating factors' *are not* 'elements' of a distinct 'capital' offense." 2003 WL 43363 at *13 (emphasis added). Rather, the court found that they are merely the "functional equivalent" of elements. *See id.* As *Sattahzan* subsequently demonstrated, in this conclusion the *Johnson* court was clearly wrong.

Moreover, as noted above, the *Johnson* court found that the four-Justice plurality in *Harris* adopted the proposition that "facts setting the outer limits of a sentence . . . are the elements of the crime . . . ." *Id.* at *14. It is clear from *Sattahzan*, however, that at least one other Justice, Justice Thomas, also accepts that proposition. Thus, the *Johnson* court's conclusion that a majority of the Court does not accept that proposition[8] is no longer valid, assuming it ever was.

CONCLUSION

It is now apparent that all or nearly all of the Justices of the Supreme Court agree that aggravating circumstances that establish death eligibility under any capital punishment scheme are elements of an offense greater than that which would exist in the absence of such factors. The FDPA does not treat its death eligibility circumstances as offense elements but only as sentencing factors. Congress' intent in doing so is binding on this court. This means that the FDPA cannot provide a vehicle for imposing a sentence of death. For that reason and because further the FDPA does not apply the Rules of Evidence to such circumstances, the FDPA is unconstitutional. For the foregoing reasons, in addition to those presented in the Defendant's Motion to Strike Notice of Intent to Seek Penalty of Death and Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death, the Court should strike the death penalty in this case and prohibit the government from seeking the death penalty against the defendant.

ZACARIAS MOUSSAOUI

Stand-by Counsel

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[8] "Only a plurality of the Court embraced the portion of Justice Kennedy's opinion . . . . Thus, *Harris* does not stand for the proposition that facts that increase the maximum punishment for a crime are 'element'. . . ."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Standby Counsel's Second Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 7th day of February, 2003.

/S/
Frank W. Dunham, Jr.